UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-jmp

Adv. Case No. 08-01420-jmp

Adv. Case No. 09-01062-jmp

Adv. Case No. 10-02821-jmp

Adv. Case No. 10-02823-jmp

- x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.

Debtors.

- x

In re

LEHMAN BROTHERS INC.,

Debtor.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

August 15, 2012

10:41 AM

B E F O R E :

HON JAMES M. PECK

U.S. BANKRUPTCY JUDGE

Hearing re: Motion of FirstBank Puerto Rico for (1) Reconsideration, Pursuant to Section 502(j) of the Bankruptcy Code and Bankruptcy Rule 9024, of the SIPA Trustee's Denial of FirstBank's Customer Claim, and (2) Limited Intervention, Pursuant to Bankruptcy Rule 7024 and Local Bankruptcy Rule 9014-1, in the Contested Matter Concerning the Trustee's Determination of Certain Claims of Lehman Brothers Holdings Inc. and Certain of Its Affiliates [ECF No.5197]

Hearing re: Turnberry Centra Sub, LLC, et al. v. Lehman Brothers Holdings Inc., et al.

Hearing re: Lehman Brothers Holdings Inc. v. Fontainebleau Resorts, LLC, et al. [Adversary Case No. 10-02821]

Hearing re: Lehman Brothers Holdings Inc. v. Fontainebleau Resorts, LLC, et al. [Adversary Case No. 10-02823]

Hearing re: Motion of Fidelity National Title Insurance Company to Compel Compliance with Requirements of Title Insurance Policies [EFC No. 11513]

Hearing re: Motion of Giants Stadium LLC for Leave to Conduct Discovery of the Debtors Pursuant to Federal Rule of

Bankruptcy Procedure 2004 [ECF No. 16016]

Hearing re: Motion of Monti Family Holding Company, Ltd for Leave to Conduce Rule 2004 Discovery of Debtor Lehman Brothers Holdings, Inc. and Other Entities [ECF no. 16083]

Hearing re: Amended Motion of Ironbridge Homes, LLC, et al. for Relief from the Automatic Stay [ECF No. 23551]

Hearing re: Application of the Ad Hoc Group of Lehman Brothers Creditors for Compensation for Professional Services Rendered by, and Reimbursement of Actual and Necessary Expenses of, Its Professionals Pursuant to Section 503(b) of the Bankruptcy Code Rendered By, and Reimbursement of Actual and Necessary Expenses of, Its Professionals Pursuant to Section 503(b) of the Bankruptcy Code [ECF No. 29195]

Hearing re: Application of the Ad Hoc Group of Holders of Notes Issues by Lehman Bothers Treasury Co. B.V. and Guaranteed by Lehman Brothers Holdings Inc., Pursuant to 11 U.S.C. § 503(b) for Allowance Of Administrative Expenses for Counsel's Services Incurred In Making A Substantial Contribution In These Chapter 11 Cases [ECF No. 29222]

Hearing re: Lehman Brothers Special Financing Inc. Working Group's Application for Entry of an Order, Pursuant to 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4) for Allowance and Reimbursement of Reasonable Professional Fees and Actual, Necessary Expenses in Making a Substantial Contribution in These Cases [ECF No. 29239]

Hearing re: Application of Goldman Sachs Bank USA and Goldman Sachs International for Entry of an Order Pursuant to 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4) for Allowance and Reimbursement of Reasonable Professional Fees in Making a Substantial Contribution in These Cases [ECF No. 29240]

Hearing re: Cardinal Investment Sub I, L.P. and Oak Hill Strategic Partners, L.P.'s Motion for Limited Intervention in the Contested Matter Concerning the Trustee's Determination of Certain Claims of Lehman Brothers Holdings Inc. and Certain of Its Affiliates [ECF No. 4634]

Hearing re: Motion of Elliott Management Corporation For an Order, Pursuant to 15 U.S.C. §§ 78fff-1(b), 78fff-2(b) and 78fff-2(c)(1) and 11 U.S.C. § 105(a), (I) Determining the Method of Distribution on Customer Claims and (II) Directing an Initial Distribution on Allowed Customer Claims [ECF no. 5129]

Transcribed by: Pamela A. Skaw

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P R O C E E D I N G S

THE COURT: Be seated, please.

MS. CAVE: Good morning, Your Honor. Sarah Cave from Hughes, Hubbard & Reed for the SIPA trustee.

There's one matter that was on -- that was contested this morning; the motion of FirstBank Puerto Rico. In the time since we arrived at Court this morning, we've been able to work out, at least a preliminary resolution with FirstBank Puerto Rico and the other interested parties, including the Chapter 11 debtors, Barclays and the repo parties. We all had a chance to confer in the hallway and that preliminary resolution is that the parties have agreed to adjourn the motion to the October 10th omnibus calendar.

THE COURT: Would have been great had you agreed to do all that yesterday.

MS. CAVE: We tried to do that, Your Honor, and were not successful in those efforts yesterday, but being here face-to-face this morning helped us --

THE COURT: Okay.

MS. CAVE: -- get it across the line, and I apologize for making the Court wait this morning but --

THE COURT: I simply note it's the first time in almost four years of Lehman hearings that we've had this sort of personal injury approach to dealing with matters of this sort. This is not a situation which should be

precedent for the future. Matters should be resolved, if at all possible, prior to A hearing and, if we're going forward, we're going forward.

MS. CAVE: Understood, Your Honor.

So, the basic resolution, as I said, is that the parties have agreed to adjourn the motion, both the reconsideration aspect as well as the limited intervention.

THE COURT: Were there any substantive agreements reached?

MS. CAVE: In terms of FirstBank Puerto Rico's objection to the trustee -- the SIPA trustee's letter of determination, the SIPA trustee has agreed to accept the objection as filed and deem it filed and pending, and the trustee has reserved his rights -- preserved his rights to object both on the basis of timeliness and on the merits and have that all dealt with at once.

And we're also coordinating with the Barclays' adversary proceeding parties as well as the repo parties because they are so many overlapping issues to be able to present all of the merits issues as well as the trustee's timeliness objections -- or timeliness arguments as to the objection to present that all at once to the Court.

THE COURT: And what's happening with intervention?

MS. CAVE: Intervention will also be -- that aspect is also being adjourned and I believe that the parties are going to coordinate scheduling of briefing on the intervention issue as well.

MR. HONEYWELL: Good morning, Your Honor. Robert Honeywell, K&L Gates for FirstBank.

Clarification on the intervention. We've agreed to adjourn to October 10th, but there's no agreement on briefing. In fact, we probably don't think that will be necessary. It simply to enable the parties to see what will happen with the debtors and the -- the Chapter 11 debtors, sorry, and the trustee settlement efforts.

All parties are reserving all rights to -- regarding a settlement motion, if it is ever filed, and the intervention, we're just going to keep it on the calendar until October 10th and see if we need it anymore. That's the idea there.

And the trustee has accurately stated the agreements regarding the reconsideration motion, and all parties are reserving all rights and, in the meantime, until the October 10th hearing, we're going to try to reach an agreement on scheduling because, as mentioned by the trustee, there are some overlapping issues and other parties have a concern about our motion affecting their motion. So this is just to give us a time to further figure out

scheduling.

THE COURT: Okay.

MR. HONEYWELL: Thank you, Your Honor.

THE COURT: I guess I'd like some clarification from the trustee as to the order of play here.

For all practical purposes, what was supposed to have happened today has simply been kicked down the road to October. There is, as I understand it, inability to deal with the claims against LBI on the merits, notwithstanding issues surrounding the timeliness of the objection to the trustee's determination, correct?

MS. CAVE: Correct.

THE COURT: But there are certain merits-based issues relating to repo transactions and determinations made with respect to repo claims against the estate. Is there an understanding as to how that is to be resolved? We had the test case which is, I believe, scheduled for November.

MS. CAVE: Uh-huh.

THE COURT: I don't know if that's going to stay in November or move. But I would be interested, at least for purposes of calendar management, to know if any understandings have been reached as to how the repo issues, in particular, will be determined. Will the test case remain as is? Is there to be a change in the test case? I understand rights have been reserved on intervention. I

don't know what the timing is in terms of the LBHI versus LBI settlement, which has been long promised but not yet documented.

MS. CAVE: Uh-huh.

THE COURT: So I'd be interested in a fuller status report as to how this is all going to be resolved, if you can give it to me.

MS. CAVE: Sure. As far as the repo calendar pertains, and those parties are here today, and I'll let them correct me if I'm getting any of this wrong, but we're not proposing any changes in the test case schedule.

Simply what we're proposing is that in dealing with FirstBank's objection, both the merits and the timeliness issue, we want to coordinate that with the other briefings and pieces of this case that are farther along, that is, both the repo -- both the repo proceeding as well as the Barclays' adversary proceeding.

So I think we're not talking about changing either of those tracks but figuring out the best way to fit FirstBank Puerto Rico and the consideration of its claim in with that in coordination.

THE COURT: Has any judgment been made as to whether the FirstBank claim, in effect, can sit on the sidelines awaiting the outcome of these other matters and, in effect, its disposition would be determined by a

disposition of the repo test case? Or are the issues with respect to FirstBank distinguishable?

MS. CAVE: I think it's fair to say that there are some issues about FirstBank Puerto Rico's claim that are distinguishable, but I don't think -- what we've agreed today is not to put them to the side but to coordinate, fit them in, with the other proceedings. However, we're continuing to discuss that with them and, you know, obviously, I think the trustee's interest is -- the aspects of the case that are farther along, including the repo proceedings, I think that's certainly something that we'll be discussing with FirstBank Puerto Rico in the hopes that that may be a place where we can get to with their claim. But that's -- that determination hasn't been made at the moment.

THE COURT: Okay. Then I guess I have a question for FirstBank which relates to the Barclays' adversary proceeding.

To what extent is the claim against the LBI estate an alternative remedy in reference to the litigation against Barclays? In other words, can you possibly get relief in both? They're alternatives, are they not?

MR. HONEYWELL: Yeah, they are legal alternatives, Your Honor. We believe that they're two different ways to get recovery. We believe that we have an independence

customer claim against the LBI estate regardless of what happens in the Barclays' adversary. The Barclays' adversary is trying specifically to recover collateral. We believe that the basis of our claim against the LBI estate is under the SIPA statute regardless of what happened to the collateral, because the SIPA statute, of course, says that if any collateral was wrongfully transferred, you continue to have a customer claim.

So we're pursuing on parallel tracks and trying to see what the results are of both the alternative remedies.

THE COURT: And is there an effort underway to coordinate these so that we at least have matters in reference to your claimed collateral heard in coordinated proceedings?

MR. HONEYWELL: What FirstBank has agreed to is to allow the Barclays' proceeding to go first, essentially, to resolve whatever it needs to on the current schedule, which is the summary judgment briefing. And, once they're done on the hearing and on the summary judgment motions, then we'll consider the merits of our customer claim. But, again, we believe they are legally independent.

Barclays seems to think that there might be some impact. We do not. So we believe -- they want us to wait. Barclays' counsel can speak for themselves. They have asked us to wait and we are agreeing to wait.

THE COURT: Okay. I'll hear from Barclays' counsel on this.

MS. GRANFIELD: Good morning, Your Honor. Lindsay Granfield, Cleary, Gotlieb, Steen & Hamilton on behalf of Barclays Capital.

Yes, Your Honor, the way in which we think that they're related is not only as you pointed out, it's kind of, somewhat of an alternative remedy theory for FirstBank, but its actual arguments about the meaning of contracts and documents are definitely -- there are some overlap issues in terms of, you know, what is their -- is to mean, what does their collateral schedule mean, and that's how we see it overlapping in substance in terms of having arguments that they may make regarding the claims that we, as part of our summary judgment, may be saying, no, that's not what it means. It means this or here's the plain meaning of that. So that's how we see it related.

THE COURT: Okay. Is there anything more that anybody wishes to add at this point? Is there anybody who understands what was just said?

(Laughter)

THE COURT: You're right. That was supposed to be a joke.

MR. MILLER: Your Honor, I --

THE COURT: Mr. Miller, do you want to come to the

podium --

MR. MILLER: Yes.

THE COURT: -- if you wish to speak?

MR. MILLER: I was going to ask permission for that. Thank you.

Running the risk of not complicating this at all, what we hope to do between now and October 10, assuming that date's acceptable to you, is to work out some of the issues that you've raised. I don't want to get into how we got to where we are because that gets more into substance that we've all agreed not to address, but I am personally hopeful, and FirstBank has instructed me that they are willing to try and work with each of the parties to fit into the existing Lehman structure and not disrupt it.

THE COURT: Well, that was certainly the suggestion in the papers that you filed.

MR. MILLER: Thank you.

THE COURT: Okay. Well, continue to work out the details then and I'll see you next time.

MS. CAVE: Thank you.

THE COURT: We're adjourned until a 2 o'clock hearing.

UNIDENTIFIED SPEAKER: Thank you, Judge.

(Recess at 10:53 a.m.)

THE COURT: Be seated, please. I'd like to start

out by expressing some confusion, and I accept the status report filed by Lehman Brothers on the docket as the most current statement of everybody's, or at least of Lehman's view, as to the current status. There was no counter statement filed by the Turnberry and Fontainebleau parties, but I want you to know that the status report, as filed, differs in tone and content from a conversation that I had with your mediator, Judge Steven Crane, and so I'd like to start with a better understanding as to the true, current status of the mediation.

On August 2nd, I received a telephone call in my chambers from Judge Crane, who spoke with one of my law clerks and who asked to be put in contact with me. I was given his telephone number and I contacted him. We spoke for perhaps ten minutes. It is the first time in my experience, both as a practitioner for a very long time and as a Judge, now for close to seven years, that I have ever been contacted by a mediator.

The subject matter of the discussion was also, I thought, unusual. He indicated that he was speaking with me with the consent of the parties, and what he said was that the parties and he believed that the process of reaching a consensual resolution would be facilitated if I were to decide the pending motions to dismiss. It was my impression, based upon that conversation, that the mediation

was still alive and that the parties intended to proceed in an effort in good faith to resolve their differences if I were to decide the motions to dismiss.

I told Judge Crane that I might simply decide to defer the matter and force the parties back to mediation. And he said in response, well, that would certainly be a message that the parties would need to think about, or words to that effect.

That conversation, to the best of my recollection, is different from the status report which provides in clear prose that, for all practical purposes, the efforts to reach a negotiated resolution failed, that the mediation is over, and that, despite best efforts, the parties are unable to act like reasonable adults. That's not what it said, that's my conclusion.

I still don't understand why the parties are unable to act like reasonable adults here, and it occurs to me that this case represents a stark and, frankly, disappointing exception to what has been the pattern and practice throughout the Lehman case, and frankly throughout all of my other experiences, failed mediation is something that I'm not very happy about.

So my first question to both sides, without revealing the substance of what went on in the mediation, is is it, in fact, over? And, if so, why?

MR. MCCARTHY: Your Honor, Ed McCarthy on behalf of LBHI and Lehman Brothers Bank. I'm here with Jackie Marcus of Weil, Gotshal and two client representatives, Joel Halpern (ph) and Joanne Kormansky (ph).

We're not happy that the settlement negotiations failed, and they did fail. But we would like to make three points that we'll address as to why, and without getting into what happened.

The first is that Your Honor ordered the parties to settle -- try to settle and that's exactly what they did. Lehman came to the mediations, all four of them, with the right information, the right intent to settle. We wanted to try to settle and the right people with full authority to settle. But we're miles apart. Truly miles apart still, Your Honor. This isn't a close case. We're miles apart. The settlement efforts have failed.

The second point is that my client came to the mediations, all of them, with the right information to determine that what was being discussed was nowhere even close to the ballpark of what's in the best interests of Lehman's creditors.

Lehman looked at the fact of what they see, which is the Soffers undisputedly have $300 million that were lent in hard money. So they analyzed, they looked at what they have and decided what could we possibly collect from this.

That's the analysis. It would be irresponsible to move too far off that analysis. That's where we're at.

And the third, and Ms. Marcus can talk about this better than I can, but Lehman and its creditors are -- they're prejudiced by the delay of this litigation. We tried in our best efforts to try to reach a reasonable settlement. We'll talk about reasonable figures. We didn't get there. The delay may be in the Soffers' best interests not having to pay debts but, in the meantime, Lehman and its creditors sit there while other creditors are going after the Soffers, some very close to judgment, some on the precipice of judgment and Lehman and its creditors are sitting there without any ability to move forward and try to get in line for collection, assuming it gets there.

We don't need to guess about what happened at the mediation, Your Honor, and I can understand that you wouldn't want to get into it, but as far as time leading up to it, I know my client spent a great deal of time, and I did too, personally, with them, with the mediator, with opposing counsel and their clients, trying to find a way around the logjam. It just did not happen. And it's not going to happen.

And it works both ways. I don't mean to point the finger. I'm sure the Soffers would have liked to settle for what they view as reasonable. So would my client. They

would like to discuss what they view -- anywhere in the ballpark of what they view as reasonable. But it's not happening and it's not going to happen, as we see it. And that's why there is a true impasse.

The parties aren't engaged in any further settlement discussions, having moved off their positions since long before August 2nd because the discussions are no longer productive. And that's our understanding as to what the mediator recognized and why he asked for our joint consent to contact Your Honor.

I certainly don't want to put words in his mouth. The failure isn't because of a lack of effort. We went there four separate times. In between, we met informally. The mediator used every trick in the book. He applied pressure where necessary, different methodology to try to get the parties close, it just didn't happen.

And remember, this isn't even the first time these parties have tried to discuss settlement. This isn't that the parties can't talk to each other. Over the last several years, these parties have met informally and formally trying to get close and it's just not going to happen.

That's why, in our view, and I think, Your Honor, appropriately read the tone of our status report, the settlement opportunities are dead right now.

There is no more mediation scheduled. We don't

know what's going to happen in the future, but all we can do is look at where we're at now and, as we see it, we have no other options other than to proceed with litigation.

And that's why, Your Honor, where we're at, which is a true standstill in the litigation, where -- since we moved to dismiss in January, 2012, of course, those are pending, fully argued. We also have a full stay of discovery because Your Honor I think appropriately pointed out that nothing should move forward in the case until the issues are streamlined and that we get a real framework of what is still in this case. So nothing is moving forward.

THE COURT: Well, let me stop you on what is still in this case as a jumping off point for further discussion.

During argument on the motions to dismiss, my recollection is that some time was spent in assessing what a discovery protocol or program would look like with some concern that it would be far afield of the central issues in dispute if Mr. Meister were to pursue fraudulent inducement claims based upon Repo 105-type theories.

When last we were together, Mr. Meister withdrew claims based upon fraudulent inducement in all the litigation, and in the aftermath of that withdrawal you went back to mediation with my strong urging.

During this period of time, has any effort been undertaken to develop a discovery protocol for litigation

that does not include fraudulent inducement claims? Or is that something to take place only after resolution of the pending motions to dismiss?

MR. MCCARTHY: Internally, on our side, Your Honor, we certainly have looked at what discovery would look like without the Repo 105 claims or defenses -- if that's just carved out of the case. In fact, we did that before -- you remember these claims were amended and the Repo 105 arguments were added. So we know what discovery would look like if this case was really about the loans and just the loan documents in dispute.

And since Your Honor advised us to go back to mediation, and we did just that, we have looked at what our discovery schedule would look like. We've pushed out dates and done it even before this hearing so we have an idea of what it might look like.

But, as we see it, it's more than just the arguments regarding Repo 105, the debtor would cause this discovery to be a huge burden beyond what it needs to be.

There's also a claim and a defense in this case that somehow these loans relate to the Adventura Mall project, which is a totally separate deal, a totally separate property in Florida, with totally different parties. And we talked about that at the motion to dismiss hearing, Your Honor.

So, in our view, the burdensomeness of the unnecessary discovery would not only relate to the Repo 105 arguments. We're hopeful that a ruling or some advice from Your Honor could make it so that what does move forward, in a streamline fashion, is truly discovery that relates to the negotiations of these loans and what happened during these loans and these properties that are really at dispute.

THE COURT: Okay. There's an aspect of this that I'm still finding a little hard to fully understand, and so I'm going to ask a somewhat similar question to the one I started with but with a slightly different emphasis.

When I spoke to retired Judge Crane, in his capacity as mediator, he led me to believe -- that doesn't necessarily mean that it was his intent, it's just the conclusion that I reached -- that my deciding the motions to dismiss, one way or the other, would facilitate the prospects of a consensual resolution, because presumably the parties would then have information that they didn't have during the mediation that would presumably lead them to act more realistically in dealing with the issues in dispute.

My question to you is do you believe that that's true or do you believe that regardless of my decision with respect to the pending motions, that the atmosphere as between the litigants is so poisonous that it is impossible to reach a resolution consensually?

MR. MCCARTHY: Your Honor, I think that I -- I think that I respectfully disagree with what retired Judge Crane -- what came across in your conversation.

I think we spent enough time trying to settle this case that we looked at both what it would mean if we won on the motion to dismiss and what it would mean if we lost on the motion to dismiss, instead had to move forward with full discovery and then see what happens next.

And, in my opinion, and perhaps the opposing counsel can address it a little more, I think they did the same thing. Both -- you were very clear, Your Honor, in what you -- your expectations of the parties both times you sent us to mediation. And we took a full scope of what was out there. There is no way that anybody could look at what my client did in negotiations and said they were unreasonable in what they were asking for or weren't willing to make large concessions. It just wouldn't be accurate.

And so, because of that, because of what we've already done and the ground we've covered, I think that Your Honor's ruling -- without me being able to look at a crystal ball and say that everything is going to change, in the near term, nothing is going to change. In the near term, settlement opportunities are dead.

My client is always willing to listen to something that comes out there. The only thing that could lead us to

change that decision, that analysis, and we've going back and forth many times with my client, the only thing that could change that is if there is a drastically different position from the opposing counsel. And we can't force them to do that, just like they couldn't force us to do it.

So I don't think that there's any more information that we could get that would lead us to change our position. And, in my opinion, based on the conversations we had, the same is true of the opposing side.

THE COURT: Okay. Mr. Meister, assuming you're the spokesperson for your side, what do you have to say?

MR. MEISTER: Yes, Your Honor. Let me see if I can address, I think, the principal question Your Honor is asking, which is are the negotiations alive or are they dead?

I have a different view than Mr. McCarthy. I find myself in a bit of a -- an awkward position because obviously it takes two to tango to put it in a colloquial way and it's, therefore, difficult for one side to say negotiations are not dead if another side says they are dead. But I think I can shed some light without getting into, of course, any of the specifics of the negotiations.

First of all, I'd like to share with the Court that I, too, having practiced for over three decades, do not recall a single instance in which, of course, I've had many

mediations, in which a mediator contacted the Court.

It was my understanding from the unilateral conversations that we had with retired Judge Crane in which he shared with us that the Lehman side was assenting to the telephone call that you received and questioned whether we would assent.

It was my clear understanding that the purpose for that call was simply because there was this -- there is a divide between the parties economically on the bid me asks, so to speak, and that that divide was driven, in large part, by differing analyses, I'll say, of the risks of the litigation.

And so it was my understanding that the purpose of the Judge -- Judge Crane, the mediator, calling the Court, which is a very unusual step, was precisely because the prospect of mediating a settlement wasn't dead. Otherwise, why place the call? Why not simply have a joint filing or a single filing that says mediation was unsuccessful, period. Please decide the motions. Why place the call in the absence of a perception by all sides, meaning by the two sides and by the mediator, that there was some possibility of getting to yes after there was a decision?

Now, I'd like to also share with the Court that in some respects I've always held the view that the decision on what's before the Court, however the Court decides it, will

not really answer the questions that are -- I guess it could, depending on the words the Court puts into its decision, but do not directly address the issues that were keeping the parties apart.

Although the Turnberry parties, my clients, have asserted affirmative claims, some now withdrawn, as Your Honor pointed out, there are separate issues which I briefly addressed when I was last before Your Honor about defenses that are related, I will say, to the same nucleus of facts forming some of the claims but are, nevertheless, defenses.

The -- I mean, it's undisputed, for example, in the Fontainebleau situation -- or property, that Lehman did not fund a large part of its loan commitment.

Now, there's certainly a dispute about whether Lehman's non-funding of the approximately, I think, $150 million unfunded balance of that loan, threw the property into bankruptcy or whether it would have gone there anyway. There's a dispute about that but there's no dispute that Lehman didn't fund its loan commitment, and there Lehman's, all of Lehman's claims are based on a guaranty with a burn down provision.

So irrespective of how the Court decides our affirmative claims there for affirmative recovery, unless the Court's comments speak to the viability of the defenses as well, that's one of the things that was keeping the

parties apart.

Similarly, in Town Square, where there isn't a guarantee, there's a $95 million loan that was -- where the individual Soffers are co-makers; however, there is an allegation, we think viable, that there was a $625 million take-out commitment that the $95 million was, in essence, a first advance under that commitment and that that commitment is tied by emails to this Adventura loan and that Lehman's insolvency in the third or fourth quarter -- third quarter of 2008, led to that -- to the non-funding of that commitment, and that that gives rise to promissory estoppel type defenses, which may be distinct from the affirmative claims.

And so what really happened in this mediation is that Lehman, in my opinion, considered its claims, its claims, sacrosanct and analyzed the situation as a virtual bankruptcy of the Soffers and made the offers that the Soffers were making in that analytical framework rather than considering, not the affirmative claims, but the quality of the defenses and whether, as I argue, there is a reasonable prospect that Lehman wouldn't be successful in its own affirmative recovery.

So I just express this to you because I think what Judge Crane had in his mind, and certainly my personal understanding of the reason for the call, was that if there

were a decision that clarified those issues, it would perhaps get the parties to yes. There were substantial offers from both sides. There was a substantial gap, no question.

The total amount of the claims is about $450 million, so you're dealing with -- your dealing with individuals, so you're dealing with a sizeable sum of money. So you can imagine that a substantial offer could be made without it being a great majority of the potential $450 million recovery.

But I would say to Your Honor that if Lehman continues to analyze the issue solely on what I call this virtual bankruptcy of the Soffers framework, then I don't think we will get to yes. If Lehman considers the risks in the litigation, or if the decision, one way or the other, speaks to those risks in terms of defenses then I suppose it would be helpful.

So, we broke up the mediation because there was this large gap between the bid and the ask and we just felt that we couldn't make any more headway in discussing with the judge and with Lehman the risks of the litigation. And Lehman, as I understood it, was saying, you know, maybe if we get a decision, we can have clarity one way or the other and either we will then, depending on what happens, resume settlement talks or just move forward with the litigation.

We would still very much like to settle. We are, of course, prepared to move forward with the litigation responsibly and as efficiently as possible. We've thought about the discovery with the excise claims. We haven't proposed a formal plan to Lehman.

I don't know, Your Honor, I hope I'm addressing Your Honor's --

THE COURT: No, that was all responsive. Thank you.

MR. MEISTER: Okay. Thank you, Your Honor.

THE COURT: Well, here's what I'm going to do. I'm going to provide guidance with respect to the pending motions to dismiss and, based upon statements that I'm making, will prepare an appropriate order.

The motion to dismiss has effectively been modified by the conduct of the parties in that fraudulent inducement claims, that represented a very significant and integrated part of the claims and defenses of the Turnberry group parties, were withdrawn.

And one of the challenges that I've had in the aftermath of Mr. Meister's withdrawal of those claims when last we were together, has been to understand what's left by virtue of the excision of those claims.

As I understand the world view of Lehman and the world view of the Turnberry parties, Lehman views each

transaction as independent and isolated, and the Turnberry parties view all of these transactions as effectively within a pool of related transaction. That world view leads to a very different perception of what the litigation is actually about, at least as I see it.

Lehman views it as somewhat surgical. They have fully integrated separate loan documents. They have the ability to pursue rights and remedies with respect to breaches under those documents, and there's effectively no crossover among the various transactions.

On the other hand, the Turnberry parties view their relationship with Lehman Brothers as one relationship that has a number of identifiable subparts. It's for that reason that so much attention has been paid to the Adventura Mall. It's role in a securitization that Lehman put together and presumably its connection in the mind of the Soffers to their overall relationship with Lehman as lender.

In effect, from their perspective as principals, there were some quid pro quos that went outside the borders of the actual loan documentation.

Now, from the Court's perspective, world views have nothing to do with the matters that are before the Court. Although I recognize that that may be what is motivating the parties, not only in their litigation judgments but in their behaviors as they think about

exposure and risk relative to the negotiations just described on the record.

That having been said, what I am left with is a very easy decision.

In part because the Turnberry parties have given up their claims and defenses based on fraudulent inducement, the contracts themselves are not subject to credible attack and their terms and conditions drive the outcome.

A litigation in which a litigant can say the contract shouldn't be enforced because we were fraudulently induced into signing it is very different from a litigation in which those same parties are raising promissory estoppel and unjust enrichment type claims.

Those claims under applicable and controlling law are, in my judgment, no longer viable, and I'm not saying they ever were viable.

For reasons that I articulated in another unrelated Lehman adversary proceeding several years ago, the language of the contracts actually matter. The case I'm referring to is LH 1440. In that case contract language permitted certain parts of an overall lending relationship that was separately documented to be separately assigned as part of a Repo transaction.

The facts and circumstances are entirely different from those presented here, but the legal principle is the

same. What the documents say matters and will be enforced.

And so, in this instance, the integration language in each of the relevant underlying transaction documents make it virtually impossible for the Soffers to be taking the position that they're now taking in a litigation that no longer includes fraudulent inducement claims, because there's no longer an effective challenge to the enforceability of the transaction documents themselves.

Nothing that I have said here is going to change the world view of either Lehman or the Turnberry parties. That presumably will continue. But as to the current posture of the litigation itself, Lehman's motions to dismiss are granted as to the remaining counts that are the subject to those motions to dismiss.

I will entertain an appropriate order consistent with these remarks and I, once again, encourage the parties to act with each other like reasonable adults.

Presumably, based upon what has been said, particularly by Mr. Meister, Lehman's approach to this includes an assessment of both legal entitlement and collection risk. That, to me, appears to be a rational way to approach what is, effectively, a collection claim.

There are defenses to those claims that presumably continue with respect to the breach of contract claims that are in the lawsuit. Those, it seems to me, can still become

the basis for a rational exchange of views as to how best to settle the differences that the parties have with each other.

If Lehman, as it professes, is concerned about timing and the prejudice of delay, the best outcome is a settlement, not only because of the obvious expenses of ongoing litigation, but also because whenever there may be a dispositive motion and/or a trial, that is only the first step in a final adjudication. This has the potential of being both unpleasant and long-lasting.

I presume the parties will act in their own economic interests and I wish you well. I'll see you next time. Please submit an order.

MR. MCCARTHY: Your Honor, may I, with one question? For discovery purposes, in the meantime, while we wait for an order or decide what we will do in settlement as well, should we get together and put together a discovery plan?

THE COURT: You should act like a reasonable litigator.

MR. MCCARTHY: Understood, Your Honor. We will.

THE COURT: That means you should put together some kind of discovery plan, frankly, one that, I thought, might have been done already but choose your poison.

MR. MCCARTHY: Thank you, Your Honor.

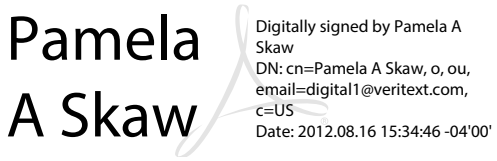
(Whereupon these proceedings were concluded at 2:42 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Pamela A. Skaw, certify that the foregoing transcript is a true and accurate record of the proceedings.



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Date: August 16, 2012